

Message

From: Moraff, Kenneth [/O=EXCHANGELABS/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=B6170EF3BAEF40C3BDECAB56FD74B07A-MORAFF, KENNETH]
Sent: 1/14/2021 3:11:31 PM
To: R1_WD_Managers_SG [R1_WD_Managers_SG@epa.gov]
Subject: FW: OW-The Morning Insider

From: Varnado, Miriam <Varnado.Miriam@epa.gov>
Sent: Thursday, January 14, 2021 9:51 AM
To: Water Program Contact List - Directors <Water_Program_Contact_List__Directors@epa.gov>
Cc: Water Program Contact List - Deputy Directors <Water_Program_Contact_List__Deputy_Directors@epa.gov>; Jones, Erica <Jones.Erica@epa.gov>; Looper, Catherine <Looper.Catherine@epa.gov>; Marcus, Pam <marcus.pam@epa.gov>; Rauscher, Leslie <Rauscher.Leslie@epa.gov>
Subject: FW: OW-The Morning Insider

Good morning All,

FYI...see below.

Regards,

Miriam

Miriam Varnado

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Subject: OW-The Morning Insider



January 14, 2021

NEWS

Politico Pro: Flint Fallout

Former Michigan Gov. Rick Snyder was charged Wednesday with two counts of willful neglect of duty over his handling of the Flint water crisis. The charges, as the Associated Press reports, are misdemeanors punishable by up to a year in jail and a \$1,000 fine, but they're historic given that no current or former governor in the state's history has been charged with crimes related to their time in office, the AP notes, citing the state archivist.

CNN: Ex-Michigan Gov. Rick Snyder charged with willful neglect of duty related to Flint water crisis

Former Michigan Gov. Rick Snyder and former Flint Public Works director Howard Croft were each charged Wednesday with two counts of willful neglect of duty as part of an investigation into the Flint water crisis, according to court documents.

Birmingham Real-Time News: Birmingham Water Works gets \$147 million EPA loan to fix aging infrastructure

The Birmingham Water Works Board says it has been approved to receive \$147 million in low-interest loans from the U.S. Environmental Protection Agency to repair or replace aging infrastructure in its water system.

Inside EPA: EPA sends water trading policy for OMB review

EPA is moving closer to finalizing a plan for boosting water quality credit trading, sending for White House pre-publication review a policy for determining water quality “baselines” for generating credits from nonpoint sources in watersheds subject to cleanup plans known as total maximum daily loads (TMDLs).

Inside EPA: Democratic States, Environmentalists Oppose EPA CWA Permitting Guide

Democratic state attorneys general (AGs) and environmentalists are calling on EPA to withdraw its guidance implementing a landmark Supreme Court ruling on when pollutants that travel through groundwater to surface waters require a Clean Water Act (CWA) permit, calling the proposed guidance illegal on several fronts.

Inside EPA: Industries Back EPA Groundwater Permitting Guide but Seek More Clarity

Industry groups are generally supporting EPA’s proposed guidance on implementing a landmark Supreme Court ruling that outlined a seven-factor test for determining when pollutants that travel through groundwater require a Clean Water Act (CWA) permit, but they are urging the agency to provide additional guidance on permit issuance.

FULL ARTICLE

Politico Pro: Flint Fallout

Former Michigan Gov. Rick Snyder was charged Wednesday with two counts of willful neglect of duty over his handling of the Flint water crisis. The charges, as the Associated Press reports, are misdemeanors punishable by up to a year in jail and a \$1,000 fine, but they're historic given that no current or former governor in the state's history has been charged with crimes related to their time in office, the AP notes, citing the state archivist.

News first broke Tuesday that Attorney General Dana Nessel was preparing to file charges against Snyder, a Republican, and other former officials over the water crisis which a spokesperson for the former governor had called a "public relations smear campaign."

The charges reportedly stem from a new review by the AG's office into the outbreak of lead poisoning and Legionnaires' Disease that sickened and killed many in Flint. Nessel has not yet said anything publicly on the matter, but is expected to make a virtual announcement at 11:30 a.m. regarding the criminal investigation into the Flint water crisis.

Nessel's office in 2019 had dropped earlier charges against former Michigan health department director Nick Lyon and other officials stemming from the water crisis, saying it would need to conduct a new investigation.

CNN: Ex-Michigan Gov. Rick Snyder charged with willful neglect of duty related to Flint water crisis

Former Michigan Gov. Rick Snyder and former Flint Public Works director Howard Croft were each charged Wednesday with two counts of willful neglect of duty as part of an investigation into the Flint water crisis, according to court documents.

The charges are misdemeanors, punishable with up to one year in prison or a fine of up to \$1,000, the state's penal code shows.

CNN has reached out to an attorney for Snyder and an attorney for Croft for comment on the charges.

Twelve people died and more than 80 were sickened as a result of two waves of a Legionnaires' disease outbreak in Flint during the water crisis.

Brian Lennon, an attorney for Snyder, said earlier Wednesday that his client was being made into a scapegoat by a politically driven special counsel. Lennon called reports that his client would be charged "meritless" and part of a "political escapade."

The Michigan Attorney General's Office had no comment about the charges Wednesday evening.

Birmingham Real-Time News: Birmingham Water Works gets \$147 million EPA loan to fix aging infrastructure

The Birmingham Water Works Board says it has been approved to receive \$147 million in low-interest loans from the U.S. Environmental Protection Agency to repair or replace aging infrastructure in its water system.

The funds are being distributed by the EPA's Water Infrastructure Finance and Innovation Act (WIFIA) program. Birmingham was one of 55 water systems across the country to receive the low-interest loans totaling \$5.1 billion across 20 states.

According to a one-page fact sheet on the WIFIA web site, the BWWB will use the funds to rehabilitate the dam at Lake Purdy and to replace water mains and rehabilitate storage tanks.

"We're ecstatic for this opportunity that will inevitably save our ratepayers money," BWWB General Manager Michael Johnson said in a news release. "This low interest loan will provide a significant part of the cash needed to fund our five-year capital improvement plan that we spend a great deal of time developing and implementing in order to modernize our water infrastructure in ways that improve public health and protect the environment."

The Water Works has been dealing with aging infrastructure for years, trying to update systems, parts of which are more than 100 years old.

The BWWB provides water service to approximately 400,000 people in the greater Birmingham area.

"When you think of the commitment that we've made to replacing aged water infrastructure in several areas of our distribution system, this low-interest investment will be critical in getting the necessary work completed in a cost-efficient manner," BWWB Assistant General Manager of Engineering and Maintenance Derrick Murphy said. "Our internal team worked diligently on this application process, and we're so thrilled that our efforts have afforded us this opportunity."

Underwriting this transaction, pending approval by the BWW Board of Directors, is expected to commence within the next several weeks.

Inside EPA: EPA sends water trading policy for OMB review

EPA is moving closer to finalizing a plan for boosting water quality credit trading, sending for White House pre-publication review a policy for determining water quality "baselines" for generating credits from nonpoint sources in watersheds subject to cleanup plans known as total maximum daily loads (TMDLs).

EPA sent its baseline policy to the White House Office of Management and Budget (OMB) on Jan. 7, according to OMB's website. The agency has not publicly announced a projected date to publish the policy.

The new policy is expected to further define one of several concepts contained in 2019 guidance that simplified federal guidelines for water quality trading by adopting six broad "market-based principles," a change from George W. Bush-era guidance that the Trump EPA said may have inadvertently discouraged trading regimes by setting a litany of specific conditions for their use.

The agency followed that by taking comment on a September 2019 proposal for a variety of tools and approaches that could be used to develop and implement nonpoint source trading baselines.

EPA noted that, to date, the agency has recommended that individual nonpoint sources had to make their portions of pollution reductions identified in a TMDL -- a level known as the baseline -- before pollution reduction activities could generate credits or offsets.

But EPA said that because in many TMDLs, this baseline is a substantial portion of the watershed's necessary reductions, achieving this level of reduction may be costly or a barrier to entering a trading or offset market. State officials gave a mixed reaction to the baseline proposal, with those states that have established trading programs raising concerns about conflicts between EPA's approach and their programs and others strongly supporting the proposal but seeking clarification on how it would be implemented.

EPA officials in November said the final water quality trading policy would be released "soon" but warned industry and local officials not to expect the plan to fund pilot programs or establish federal credit-trading "clearinghouse" operations, saying the agency intends to create a "foundation" for states to implement.

Inside EPA: Democratic States, Environmentalists Oppose EPA CWA Permitting Guide

Democratic state attorneys general (AGs) and environmentalists are calling on EPA to withdraw its guidance implementing a landmark Supreme Court ruling on when pollutants that travel through groundwater to surface waters require a Clean Water Act (CWA) permit, calling the proposed guidance illegal on several fronts.

The National Ground Water Association (NGWA), which represents groundwater professionals working for private industry, the consulting community, academic institutions and local, state and federal government, does not go as far as calling for EPA to scrap the guidance but still says the document falls short of what is needed. And NGWA objects to the guidance's use of permitting factors beyond the high court's ruling.

The Supreme Court last year in County of Maui v. Hawaii Wildlife Fund outlined seven factors for permitting authorities to consider in determining whether pollutants that reach surface waters after traveling through groundwater are a "functional equivalent" to a direct discharge and therefore require a National Pollutant Discharge Elimination System (NPDES) permit.

Those factors are transit time, distance traveled, the nature of the material through which the pollutant travels, the extent to which the pollutant is diluted or chemically changed as it travels, the amount of pollutant entering the navigable waters relative to the amount of the pollutant that leaves the point source, the manner by or area in which the pollutant enters the navigable waters, and the degree to which the pollution at that point has maintained its specific identity.

EPA in December proposed guidance to add an additional factor of the design and performance of the system or facility from which the pollutant is released, an approach supported by numerous industry groups. The agency took comment on the draft guidance until Jan. 11 and then sent a final guidance for White House review Jan. 12, and might try to issue the final version before President Donald Trump leaves office.

Democratic AGs from 11 states and the District of Columbia say in Jan. 11 comments the additional factor “contravenes the *County of Maui* decision and would be harmful as a policy matter.” They say this factor “is unlawful and should be abandoned.” The states signing on to the comments are Maryland, California, Connecticut, Illinois, Maine, Massachusetts, Michigan, New Mexico, Oregon, Rhode Island, and Vermont.

The additional factor concerns circumstances antecedent to the point of discharge and such circumstances are irrelevant to whether that discharge is “functionally equivalent” to a direct discharge, a point that is confirmed by the factors the Supreme Court did list in the *Maui* ruling, the AGs say.

While it may be true, as a factual matter, that a particular facility is designed to direct the pollutant in a manner that increases the time it takes for pollutants to reach navigable waters, or the distance the pollutants travel to reach such waters, “there is no need to consider the facility’s design as a *separate* factor,” the AGs say. “Considering the facility’s design in its own right, on the ground that it prolongs the time or the distance of travel, would be double-counting and would stack the deck against functional equivalence,” they add.

The additional factor that EPA proposes would also be harmful as a matter of policy for two reasons, the AGs say. First, it would give polluters a new, yet meritless, way to argue to regulators or in court that their discharges fall outside the CWA’s prohibition on unpermitted discharges. For example, an indirect discharger would be able to argue that because it treats its effluent before discharging it into groundwater, the discharge is not the functional equivalent of a direct discharge and thus is not regulated by the CWA.

“These arguments would complicate, confuse, and delay permitting processes and decisions. They would do the same for judicial proceedings, including proceedings that involve unpermitted facilities. And they would do so even though this additional factor does not itself inform the functional equivalence analysis directed by *County of Maui*, as explained above,” the AGs argue.

Second, the additional factor would give polluters an incentive to avoid regulation simply by relocating discharge pipes from navigable waters to groundwater, which is the type of strategic behavior that troubled the Supreme Court in *Maui*, the AGs say. The environmental benefits of treatment alone are no greater for a facility that discharges to groundwater than one that discharges directly into a navigable river, “so it is illogical to consider the fact of treatment differently” in these scenarios, the AGs say.

“In sum, if EPA finalizes the Draft Guidance, it should omit the factor that it proposes to add to those already listed in the *County of Maui* decision,” the AGs say.

Environmentalists’ Criticisms

The Center for Biological Diversity (CBD) in Jan. 11 comments says “EPA must abandon the guidance immediately” because it misinterprets Supreme Court precedent, ignores the plain text of the CWA, and includes agency decision making that can only be legally accomplished through notice and comment rulemaking under the Administrative Procedure Act (APA).

“If, however, in the waning hours of the Trump Administration, EPA decides to recklessly continue forward with finalizing the Draft Guidance, it cannot do so without first completing its Section 7 consultation obligations under the” Endangered Species Act (ESA), CBD says.

The draft guidance tries to recast the high court’s “decision in *Maui*, as well as th

e entire structure of the CWA, as narrowly as possible -- far narrower in fact than the CWA allows -- and to characterize entry into the NPDES permitting program by point sources that discharge through groundwaters to surface waters as merely voluntary.” CBD says.

The group calls this a “catch me if you can” approach to CWA permitting and says the “system design and performance” factor creates an additional loophole around the NPDES permitting program. The loophole ignores pollutant fate and transportation data and will have the effect of excusing notoriously polluting facilities such as coal ash dumps and concentrated animal feeding operations from having to seek NPDES permits for their discharges through groundwater into surface waters, CBD says.

“But even more fundamentally, this loophole attempts to unlawfully ascribe polluter intent to the CWA’s existing, statutorily-based strict liability scheme. This is plainly unlawful,” CBD says.

Additionally, CBD says the draft guidance is not only substantively unlawful but also procedurally unlawful because in creating a new significant factor not previously identified by the Supreme Court, EPA is effectuating a change in the law entirely outside of the rulemaking process required by the APA.

And CBD says that because the guidance is discretionary, EPA is required to conduct ESA section 7 consultations because the draft guidance “will almost certainly exceed the ‘may affect’ triggering threshold of the ESA.”

Insufficient Guidance

NGWA says in its [Jan. 11 comments](#) that as a statement of policy, the guide falls short of providing focused advice to states, industries that generate point source pollutants that may be discharged to groundwater and travel to waters of the United States, and consultants who may assist states and industry in addressing this pollution.

The guidance provides no useful direction to potential dischargers or to state regulators on how to evaluate their individual sites and implement consistent decisions that are protective of the environment and aligned with the intent of the guidance, NGWA says. The group adds that decisions about applicability of the Supreme Court decision should be based on the pollutants of the wastewaters involved and the science and engineering principles for pollutant fate and transport applied to individual sites, regardless of the facility type.

The “design and performance of the facility or system” should not be considered in determining functional equivalent but instead NPDES regulatory decisions should start with pollutant composition and volume and then be evaluated based on the seven factors the Supreme Court specified, NGWA says. “An array of specific sound scientific and engineering protocols is available to perform determinations of each of these [seven] factors.”

“Broadly accepted sound science guidance for making determinations of a point source pollutant discharge to groundwater reaching waters of the United States should be developed, building on current knowledge, to enable potential dischargers and the regulatory authorities to decide with confidence whether a permit is needed in each case,” NGWA says. “Well-developed and accepted technical guidance will be an important undertaking that should track with states’ technical groundwater requirements to limit burdensome regulatory process and permitting mandates.”

Inside EPA: Industries Back EPA Groundwater Permitting Guide but Seek More Clarity

Industry groups are generally supporting EPA’s proposed guidance on implementing a landmark Supreme Court ruling that outlined a seven-factor test for determining when pollutants that travel through groundwater require a Clean Water Act (CWA) permit, but they are urging the agency to provide additional guidance on permit issuance.

“We support the Draft Guidance, and we recommend that EPA issue it in final form” after considering comments, the Federal StormWater Association (FSWA), a coalition of industrial, municipal, and construction-related entities, says in [Jan. 11 comments](#).

But FSWA says it is also important for EPA to consider issuing guidance on the related and “just as important” issues of what information must be provided in a permit application subject to the Supreme Court’s “functionally equivalent” test and how the permitting authority should determine effluent limits and other requirements that must be included in a National Pollutant Discharge Elimination System (NPDES) permit.

The Supreme Court last year in *County of Maui v. Hawaii Wildlife Fund* outlined seven factors for permitting authorities to consider in determining whether pollutants that reach surface waters after traveling through groundwater are a “functional equivalent” to a direct discharge and therefore require an NPDES permit.

Those factors are transit time, distance traveled, the nature of the material through which the pollutant travels, the extent to which the pollutant is diluted or chemically changed as it travels, the amount of pollutant entering the navigable waters relative to the amount of the pollutant that leaves the point source, the manner by or area in which the pollutant enters the navigable waters, and the degree to which the pollution at that point has maintained its specific identity.

EPA said its December [proposed guidance](#) “places the functional equivalent analysis into context within the existing NPDES permitting framework and identifies an additional factor for the regulated community and permitting authorities to consider when evaluating whether and how to perform a ‘functional equivalent’ analysis.”

The additional factor is the design and performance of the system or facility from which the pollutant is released, which industry groups strongly support but environmental groups and Democratic state attorneys general [claim is illegal](#). The agency took comment on the draft guidance until Jan. 11 and then sent a final guidance for White House review Jan. 12, and could attempt to issue the final version before President Donald Trump leaves office.

Including Additional Factor

FSWA supports EPA’s inclusion of the additional factor in the guidance, saying consideration of design and performance of the system would assist the permitting authority in assessing the other factors that the Supreme Court said were relevant to a “functional equivalent” determination.

Unintentional leaks or incursions of pollutants into groundwater that may eventually reach surface waters should not be deemed to meet the functional equivalent test because there is no possible way for the system operator to apply for a permit in advance of the unplanned release, and it is hard to imagine how the permit requirements could be applied in that instance, FSWA says.

FSWA also urges EPA to read the *Maui* ruling in concert with the Supreme Court’s handling of another similar case, *StarLink Logistics, Inc. v. ACC, LLC, et al.*, where StarLink claimed ACC was illegally discharging pollutants from a Tennessee landfill without a NPDES permit and that the facts in its case clearly fit the high court’s functional equivalent test. But the high court denied StarLink’s petition for *certiorari*. “While no clear message can be drawn from summary action by the Supreme Court, one might infer that these facts did not meet the Court’s new ‘functional equivalent’ test; and that no NPDES permit was required. That outcome should also help to inform EPA’s Draft Guidance,” FSWA says.

FSWA also urges EPA to consider addressing procedural issues, such as concerns about the potential for liability, including through citizen suits, in situations where a permitting agency determines there is a functionally equivalent discharge but a permit has not yet been granted.

“[I]t serves no legitimate purpose to subject that system or facility operator to potentially heavy penalties, when it had no notice that it was required to have a permit, it is complying with the new requirement to obtain a permit, and it is awaiting its new permit,” FSWA says. “EPA should make it clear that in such a situation, the system or facility operator should not be subject to claims for past or current CWA noncompliance as long as it is meeting the application schedule set forth by the agency and working with the agency to obtain the new permit.”

Seeking Additional Clarification

The Federal Water Quality Coalition (FWQC), a similar coalition of industrial companies, municipal entities, agricultural parties, and trade associations, echoes many of FSWA’s points in its [Jan. 11 comments](#), supporting the proposed guidance and the additional factor but calling for more clarification from the agency.

While EPA has issued detailed regulations on the content of NPDES applications and permits and developed extensive guidance documents that further specify how the NPDES rules should be implemented, none of those address the functional equivalent situation, FWQC says. And it is far from clear how the existing NPDES rules and guidance should be applied to that situation.

“For example, if the application requires that effluent test results be submitted indicating the levels of various pollutants, where is the point where sampling should be conducted for an addition of pollutants into groundwater? Is it at the point of release into the soil, or somewhere in the aquifer, or at the eventual surface water destination?” FWQC asks.

“Then, when the permitting agency has to evaluate the “reasonable potential” of the discharge to “cause or contribute” to water quality standard violations, how is that evaluation conducted?” the coalition adds.

Given that pollutants can attenuate in the soil and groundwater, and undergo other fate and transport changes, FWQC asks how those changes taken into account in determining whether a particular discharge should receive a permit limit for a specific pollutant and where is the point of compliance once the permit limit is calculated.

“The answers to these questions, for a ‘functional equivalent’ discharge, are not obvious,” FWQC says, recommending that EPA work closely with states, regulated parties, and other stakeholders, to ensure that the permitting of “functional equivalent” discharges takes place in a manner that is efficient, effective and scientifically appropriate.

The National Cattlemen’s Beef Association in [Jan. 8 comments](#) also backs the inclusion of the design and performance factor in the guidance. “This eighth factor, which accounts for system design, is vitally important for farmers who work hard to manage manure, ensuring that these pollutants are not directly discharged to navigable waters,” the group says.

Bloomberg Law: ‘Troubling’ Results Seen in EPA Look at Two Newer PFAS Chemicals

Early data from the EPA’s ongoing studies of two of the newer types of so-called forever chemicals shows they can harm laboratory animals exposed in the womb, which suggests they also could harm people.

Hexafluoropropylene oxide-dimer acid, known as GenX, and nafion byproduct 2, known as NBP2, “produce neonatal mortality” similar to older, hazardous per- and polyfluoroalkyl substances, or PFAS, that largely have been phased out of U.S. production, said Justin Conley, a reproductive research biologist with the Environmental Protection Agency.

The deaths occurred to laboratory rats exposed in the womb known as pups. In the mid-2000s, similar results from a well-known older PFAS chemical, PFOA, caught federal agencies by surprise.

Conley and L. Earl Gray, Jr., also an EPA reproductive biologist, on Wednesday shared their personal scientific impressions about their ongoing PFAS studies during a Society for Toxicology webinar. The EPA's water office is using the GenX data as it reviews that chemical, Gray said.

The two PFAS Conley and Gray discussed were among a group of 54 for which six North Carolina nonprofit groups are seeking data. The groups asked the EPA to require the Chemours Co. to generate data on the chemicals, which have been found in the environment and people's bodies around the company's Fayetteville, N.C. plant. EPA rejected that petition Jan. 8.

'Very Scary Indicator'

EPA's findings are "troubling" and "absolutely supports the need for the toxicity information the groups sought," said Drake Phelps, a researcher studying the immune effects of PFAS, who advised the petitioners.

"Pup mortality is a very scary indicator of what these chemicals can do," he said.

The agency's data also underscores the need for more data on newer PFAS, because its own studies showed that combinations of the chemicals, which is what people have in their bodies, work more powerfully, Phelps said.

Chemours has said the company has taken numerous steps to reduce PFAS emissions and address remediation needs.

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